NO. 9344

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

MIGUEL ZAMORA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

Upon Appeal from the District Court for the District of Alaska, Division Number One.

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INDEX

CASES CITED

TEXT BOOKS

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JURISDICTION

This is a criminal action in which the jurisdiction of this Court and the District Court has been invoked under the provisions of Section 225 (a and three) (d) of Title 28, U. S. C. A., Judicial Court and Judiciary, and Section 101 of Title 48, U. S. C. A.

The action was instituted by indictment of a grand jury of the United States District Court for Alaska for the First Division, on a charge of violation of Section 4789, Compiled Laws of Alaska.

STATEMENT OF THE CASE

Appellant was indicted, tried and convicted of the

crime of arson, in the District Court of the First Judicial Division of Alaska, and sentenced to a term of twenty years in the Penitentiary, the maximum under the laws of Alaska.

Appellant was married to the adopted daughter of John Silva, a resident of Petersburg. Domestic difficulties existed between appellant and his wife, Helen. She, with her minor child, was living with her stepfather, Silva, in a frame building. On April 7th, 1938, appellant, for the purpose of visiting his wife and child, called at Silva's home and was denied admission. (R. 41). An argument ensued between appellant and Silva, and Silva testified that appellant made the statement, "You are very proud because you got a house. You will never see your house some day." (R. 42). That evening the house took fire and was totally destroyed.

The evidence showed that there was a heater and a kitchen stove in the house. The heater, a wood-burner, was about three feet from the wall. The kitchen stove was two feet and one-half from a bathroom partition, and oil was used in it. Both stoves were served by one chimney. The evening of the fire, there was a fire in the heater. (R. 45). The occupants of the house did not go to sleep until the fire in the heater burned out. (R. 46). The house fire occurred around 1:00 a. m., the morning of April 8th, 1938.

There was evidence to show that Alice Bassford, who also was living with the Silvas, went to bed at 10:00 p. m.,

and occupied a bed with appellant's wife and Mabel Jackson. Alice did not go to sleep that night, and about 12:00 o'clock she got out of bed and with appellant's wife, Helen, went to the bedroom and smoked a cigarette. (R. 50, 51) (R. 67).

There was evidence tending to show that Alice got a package of cigarettes and matches from a shelf, and she and Helen Zamora started smoking in the kitchen and then went back to the bedroom, still smoking. They had one cigarette and took turns smoking it. (R. 67). The bedroom adjoined the room in which the fire apparently started.

After the fire, Silva notified the police regarding appellant's statements made the evening before, and it was upon these statements that a prosecution ensued.

An offer of proof was made tending to show that the chimney at the Silva house was defective and that three days prior to the fire which appellant is accused of having committed, this defective chimney caused a fire, and that no repairs or cleaning of the chimney had been accomplished in the meantime. This offer of proof was denied. (R. 23).

After a trial before the Honorable George F. Alexander, District Judge, and a jury, defendant was found guilty, and judgment was entered on the verdict. (R. 15-16). Notice of Appeal was served, and filed on February 13th, 1939. (R. 17). The Bill of Exceptions was duly filed, settled and certified on July 31st, 1939.

(R. 20, 21). At the close of the evidence, the defendant submitted a motion for a directed verdict, on the ground that there was no substantial evidence to warrant a verdict of guilty. This motion was overruled and exception was taken. (R. 80, 81).

QUESTIONS PRESENTED

1. Whether there was any substantial evidence sufficient to warrant submission to the jury of the case.

2. Whether error was committed in admitting of evidence in behalf of the Government.

3. Whether error was committed in rejecting evidence offered by the defendant.

SPECIFICATIONS OF ASSIGNED ERRORS

Th assigned errors relied upon by the defendant are those numbered: 1, (R. 22); 2 (R. 35); 3, (R. 37); 4, (R. 37); 5, (R. 38); 7, (R. 38).

PERTINENT STATUTE

The defendant is charged with violation of Section 4789, Compiled Laws of Alaska, 1933, which reads as follows:

> Sec. 4789—Arson By Burning Dwelling House. If any person shall willfully and maliciously burn any dwelling house of another, or shall willfully or maliciously set fire to any building owned by himself or another, by the burning whereof any dwellin house of another shall be burned, such person shall be deemed guilty of arson and upon convic-

tion thereof shall be punished by imprisonment in the penitentiary not less than ten nor more than twenty years.

ASSIGNMENTS OF ERROR

SECTION I.

Errors at law, occurring during the trial and excepted to by defendant as follows: (R. 87)

POINT NO. 1

The Court erred in denying defendant's offer to prove the defectiveness of the chimney at the Silva house, that it had caused a fire a few days prior to the alleged crime of arson, and that no cleaning of the chimney had been made in the interim. (R. 87).

POINT NO. 2

The Court erred in denying defendant right to introduce expert testimony concerning fire hazards and causes in general, and particularly in regard to hazards arising out of defective chimneys, such as referred to in Point 1. (R. 88).

POINT NO. 3

The Court erred in denying the defendant the right to impeach Mabel Jackson, an eleven year old Indian girl, who was the only witness to connect defendant with the place of the fire, by showing that Mabel Jackson had made a false statement in her testimony given on direct examination. (R. 88).

POINT NO. 4

The Court erred in denying defendant's motion for an instructed verdict of not guilty, at conclusion of presentation of defendant's evidence, on the ground that the evidence before the jury was not sufficient to sustain a verdict of guilty. (R. 88).

POINT NO. 5

The Court erred in denying defandant's motion to set aside the verdict of the jury because it was not supported by the evidence. (R. 88).

POINT NO. 6

The Court erred in denying defendant's motion for a new trial and his motion for re-opening hearing on motion for new trial, after the discovery of evidence material to the defendant, as set up in said motions and accompanying affidavits, which are included in the record. (R. 89).

SECTION II.

Insufficiency of evidence to warrant a verdict of guilty, and verdict is against law. (R. 89).

1. No corpus delicti was proved as there was no evidence showing the criminal origin of the fire. (R. 89).

2. The Government failed to offer evidence to rebut presumption that fire was accidental or providential, and defendant's offers of proof in that connection were denied. (R. 89).

3. The Government failed to offer any evidence con-

necting defendant with purchase or possession of gasoline, or other inflammable substances. (R. 90).

4. The Government failed to connect defendant with the fire, by failing to show that he was on the premises or near them, or had opportunity to set the fire. (R. 90).

ARGUMENT

POINT NO. 1

The Court erred in denying defendant's offer to prove the defectiveness of the chimney at the Silva house, that it had caused a fire a few days prior to the alleged crime of arson, and that no cleaning of the chimney had been made in the interim. (R. 87).

POINT NO. 2

The Court erred in denying defendant right to introduce expert testimony concerning fire hazards and causes in general, and particularly in regard to hazards arising out of defective chimneys, such as referred to in Point 1. (R. 88).

It is a well-established rule of the law of arson, that where a building is burned, the presumption is that the fire was caused by accident or natural causes rather than by the deliberate act of the accused.

6 *C. J. S. Sec.* 296;
State v. Jones, 106 *Mo.* 302;
State v. Millmeier, 102 *Iowa* 692;
4 *Elliott, Evidence Sec.* 2807;
Williams v. State, 90 *Ind. App.* 667;
Rogers v. State, 48 *Pac.* (2) 344.

The mere burning of a building does not constitute the *corpus delicti* of the crime of arson. There is no presumption that a burning building has been intentionally set on fire; on the contrary, the presumption of innocence, which is accorded to an accused, carries with it a presumption that the fire is of accidental or providential origin.

Sec. 6 and Sec. 282, The Law of Arson by Curtis, 1936.

O'Brien v. State, 39 *Ariz.* 298, 6 *Pac.* (2) 421.

People v. Jenkins, 67 *Cal. App.* 631, 228 *Pac.* 405.

State v. Cristani, 192 *Iowa* 615.
State v. Elwell, 105 *Ore.* 282, 209 *Pac.* 616.

State v. Picnick, 46 *Wash.* 523, 90 *Pac.* 645, 11 *L. R. A.* (*NS*) 987.

Appellant, to establish the fact that the fire was of accidental origin, called as a witness, Helen Zamora. Upon objection to the evidence the following offer of proof was made: (R. 22, 23).

> Q. Had you had a fire in the house a few days before this?
>
> MR. FOLTA: I don't see where that is relevant.
>
> THE COURT: I don't either. We are not trying but one fire at a time.
>
> MRS. HERMANN: We don't want to; but I have an offer of proof to make here. If the Court doesn't want the jury to hear it I still desire to make it.

THE COURT: The jury will be excused until called.

(The jury retired from the court room)

THE COURT: You may make your offer of proof for the purpose of the record.

MRS. HERMANN: Let the record show the defense offers to prove by this witness, and other witnesses, that the chimney at the Silva house was defective and had caused a fire—this defect had caused a fire a few days prior to April 8th and that no repairs or cleaning of the chimney had been accomplished in the meantime. Let the record further show that John Silva, who testified yesterday that there had been no fire prior to the one that destroyed his home on April 8th, himself climbed on the roof and put out the fire.

THE COURT: What do you mean "within a few days."?

MRS. HERMANN: About three days, I think. I would have to establish that by witnesses.

THE COURT: You should know.

MRS. HERMANN: Three days is what she told me.

MR. FOLTA: That she can get that testimony doesn't make this testimony, in regard to any fire previously, competent.

THE COURT: Until the proper foundation is laid, this testimony you suggest would not be competent.

MRS. HERMANN: It certainly would be competent to impeach the witness John Silva.

MR. FOLTA: It would be on an immaterial matter.

MRS. HERMANN: I don't admit it is immaterial.

THE COURT: As the record stands it would certainly not be competent. The offer will be refused.

MRS. HERMANN: Let the record show the defense excepts to the ruling of the Court as prejudicial to the right of the defendant to show the cause of the fire which destroyed the building which he is accused of burning.

In rejecting this evidence, we submit palpable error was committed.

In the case of *State v. Delaney*, 92 *Iowa* 468:

Defendants were convicted of arson. Defendants sought to show that, in the room where the fire was discovered, they kept a gasoline stove, which leaked gasoline; that the same ran onto the floor and had once caught fire. Defendants were not permitted to show the fact that the gasoline had caught fire and this was assigned as error.

HELD, the entire evidence as to defendants' guilt was circumstantial, and we think they should have been permitted to have the benefit of the proposed evidence. They were entitled to the benefit of any legitimate testimony which might throw any light upon the cause of the fire. *If it was true that a fire had once caught from this cause, it was proper to show that fact*, as tending to account for the fire which defendants were charged with setting. (Italics ours).

Another authority in point is *State v. Smith*, 142 *Wash.* 57, 252 *Pac.* 530. We quote it at length:

"It is first urged that error was committed by the trial court in refusing to give an instruction to the effect that, when a building is burned, the presumption is that the fire was caused by accident or natural causes rather than by the deliberate act of the accused.

In State v. Pienick, 46 Wash. 522, 90 P. 645, 11 L. R. A. (NS) 987, 13 Ann. Cas. 800, we stated the rule to be that, "where a building is burned, the presumption is that the fire was caused by accident or natural causes rather than by the deliberate act of the accused." We there held that the evidence was insufficient to warrant a conviction. The requested instruction properly stated the law.

The theory upon which the refusal to give this instruction is sought to be upheld by counsel for the state is that, since the state offered evidence indicating the fire was of incendiary origin, the presumption falls of its own weight. But we think this argument is unsound. *There is always a presumption that a fire is of accidental origin where the origin is a contested issue.* In the instant case the question of whether the fire was so set was a very serious one. There were facts relied upon by the state that it believed showed the fire was incendiary. On the other hand, the appellant insisted just as strongly that the evidence did not establish that fact. *The evidence showed two previous fires in the same building, neither of which, apparently, were incendiary.* The issues were thus presented to the jury on this point. Was not the appellant entitled to the presumption that the fire was of accidental origin in a case where its origin was actually disputed?

To hold otherwise is to say that the presumption can never be available to a defendant in any

case where the state seeks to show what caused the fire. Manifestly, this robs the defendant of a very vital protection in a case of this character.

The state seems to argue that this presumption is proper for the court to indulge in when it determines whether there is sufficient evidence to sustain the verdict. If this be so, then we know of no reason why the jury should not be so instructed when they are to determine whether the evidence is sufficient to establish the origin of the fire." (Italics ours).

It is competent for accused to prove any fact which may tend to explain or answer any incriminating evidence against him . . . He is likewise entitled to introduce evidence tending to show that the fire was accidental. 6 *C. J. S. Sec.* 36.

In a prosecution for arson . . . it is incumbent on the state to prove the corpus delicti, and it is now recognized as the universal rule in the law of arson that in order to establish the corpus delicti it is not only necessary that the state prove the burning of the building in question, *but the evidence must also disclose that it was burned by the willful act of some person criminally responsible* for his acts, and *not by natural or accidental causes.* 6 *C. J. S. Sec.* 29 (a).

In the case at bar we have no isolated fire but the second of a series of fires caused by a defective chimney, the previous fires having been only three days before, and the offer to prove that the chimney had not been repaired or cleaned since the previous fire. (R. 23-25 inclusive). By denying defendant the right to introduce testimony

on this point, the court prevented his laying the foundation for testimony from expert fire fighter, relative to the hazards of fire as caused by defective chimneys, and the probability of smouldering sparks from such defects as existed.

The Court erred in refusing admission of testimony of V. M. Mulvihill, a fire-fighting expert, regarding causes of fires in general, and in particular regarding hazards caused by defective chimneys. Inasmuch as Mr. Mulvihill's testimony would have showed probable causes of the fire which destroyed the Silva home, he should have been allowed to testify, under the theory expressed above, that defendant is entitled to introduce evidence showing that fire might have been accidental.

In view of the law as hereinbefore demonstrated, we submit the court substantially erred in rejecting the offer of proof to show that the fire resulted from accidental rather than criminal sources. It is reasonable to believe that if a fire of *accidental* origin took place three days previously, it is a cogent reason for believing that it was accidental the night it occurred and for which appellant received a twenty-year sentence. A jury should have been given the benefit of the evidence of the previous fire.

ARGUMENT

POINT NO. 3

The Court erred in denying the defendant the right to impeach Mabel Jackson, an eleven year old Indian girl, who was the only witness to connect defendant with the

place of the fire, by showing that Mabel Jackson had made a false statement in her testimony given on direct examination. (R. 88).

Mabel Jackson testified (R. 48) that she saw defendant running between two houses. Mrs. Zamora, wife of defendant, was called as a witness (R. 26) to contradict testimony given by Mabel. In view of the fact that proof in this case was entirely circumstantial, in the interest of justice the contradictory evidence should have been admitted.

ARGUMENT

POINT NO. 4

The Court erred in denying defendant's motion for an instructed verdict of not guilty, at conclusion of presentation of defendant's evidence, on the ground that the evidence before the jury was not sufficient to sustain a verdict of guilty. (R. 88).

POINT NO. 5

The Court erred in denying defendant's motion to set aside the verdict of the jury because it was not supported by the evidence. (R. 88).

The evidence in this case is entirely circumstantial. Every circumstance of the case is reasonably reconcilable with the theory of the innocence of appellant. It is unlikely that appellant who was in love with his wife and baby would set the house on fire, thereby destroying those

who were near and dear to him. The rule is established without exception in the Federal Courts that facts which merely give rise to a reasonable and just inference of guilt of the accused, are insufficient to warrant a conviction. To warrant a verdict of guilty, the evidence must be of such character as to exclude every reasonable hypothesis but that of guilt. The facts must be consistent with his guilt only, and inconsistent with his innocence. Terry v. U. S. (C. C. A. 9) 7 Fed. (2) 28, 31. The proof was that appellant did everything he could to extinguish the fire. (R. 57). Whenever a circumstance relied upon as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though, from the other inference, guilt may be fairly deductible. Turinette v. U. S., 2 Fed. (2) 15 (C. C. A. 8); Vernon v. U. S., 146 Fed. 121. All the Government offered was appellant's animosity toward Silva. To arrive at a conclusion of guilt upon the facts in this case, it is based purely upon suspicion, speculation and conjecture. Evidence creating a suspicion does not rise to the dignity of substantial evidence.

> "No general rule can be laid down as to the quantity of circumstantial evidence which, in any case, will suffice. All the circumstances proved must be consistent with the hypothesis that the accused is guilty, and, at the same time, inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt." 12 Cyc. Law & Proc. p. 488. State v. Morney, 196 Mo. 43, 93 S. W. 1117.

In State v. Payne, 6 Wash., 563, 34 Pac. 317, the court, in passing on an assignment of error similar to the one here involved, said:

> "No man ought to be convicted of a crime upon mere suspicion, or because he may have had an opportunity to commit it, or even because of bad character; and, where circumstances are relied on for a conviction, they ought to be of such a character as to negative every reasonable hypothesis except that of the defendant's guilt. And a new trial should be granted where a conviction is had on evidence not connecting the defendant with the crime beyond a reasonable doubt."

The case of Williams v. State, 85 Ga. 535, 11 S. E. 859, cited with approval by the court in State v. Payne, supra, was one in which the defendant had been convicted of arson. The facts there proven are set forth in the statement, and create as much suspicion against the accused as the facts in this case. The Supreme Court of Georgia, however, in reversing the judgment of conviction, said:

> "The evidence in a criminal case must be sufficient to satisfy the jury, beyond a reasonable doubt, of the guilt of the accused, before they are authorized to find a verdict of guilty. The evidence in this case raises a suspicion against the accused, but we do not think it connects him with the crime beyond a reasonable doubt; and for this reason we reverse the judgment of the court below in refusing to grant a new trial."

In State v. Morney, supra, an arson case, the Supreme Court of Missouri, discussing circumstantial evidence, said:

> "Where a chain of circumstances leads up to and

> establishes a state of facts inconsistent with any theory other than the guilt of the accused, such evidence is entitled to as much weight as any other kind of evidence; but the chain, as it were, must be unbroken, and the facts and circumstances disclosed and relied upon must be irreconcilable with the innocence of the accused in order to justify his conviction."

See also the following cases, in which the evidence was held insufficient to sustain convictions of arson: Jones v. Com. 103 Va., 1012, 49 S. E. 663; People v. Johnson, 70 App. Div. 308, 75 N. Y. Supp. 234; People v. Wagner, 71 App. Div. 399, 75 N. Y. Supp. 950; Brown v. Com. 87 Va., 215, 12 S. E. 472; People v. Kelly, 11 App. Div. 495, 42 N. Y. Supp. 757; Anderson v. Com. 83 Va., 326, 2 S. E. 281.

In the case at bar, there is no testimony offered about debris piled up, oil-soaked rags or papers, which the experienced fire fighter considers evidence of incendiarism; no evidence is offered concerning possible containers for gasoline, though gasoline could not be carried about except in a container of metal, glass or other non-inflammable substance. Alice Bassford says she heard no sounds of any kind (R. 52), either in the house or outside, though she was wide awake in the room adjoining the bathroom where the fire started, and the door between the two rooms was open. Granier (R. 53) says he heard no "noise of any kind, no talking and no movement," though the hour was around one in the morning.

No testimony of any sort is offered by the Government

to remove the presumption that the fire might have been due to any of the following commonest causes of accidental fire:

1. Carelessness of smokers in disposing of cigarette butts and match stubs, "I remember Helen saying, after the fire right outside, 'I shouldn't have smoked in there,' or something like that." (R. 52) . . . "After I lay down with the baby I stayed in bed until about 11. Then I got up. Alice did too. We smoked, both of us. We started smoking in the kitchen and continued on into the bedroom. We had one cigarette and we took turns on it. We were up about ten minutes. I do not know what became of the cigarette butt." (R. 66).

2. Spontaneous combustions; 3. Explosion in feed pipes of gravity flow oil burner (R. 64, 65), converted from a coal range, a common cause of fires, as any person knows; 4. Sparks smouldering in the walls, defective chimney, defective wiring, or lack of dangerous lighting devices, such as candles, gasoline lamps, oil lamps, etc., though all of these rank high in the lists of causes of accidental fires.

A case practically on all fours with the case at bar, is State v. Jones, 215 N. C. 660, 2 S. E. (2) 867. In that case, evidence produced at trial showed that during night time, the dwelling house of Smith, while occupied by him and his wife and children, caught fire and was burned to the ground. Smith and his family went to bed about 10:00 p. m., and that about 2:00 a. m. he was awakened and found his house on fire, and by quick action he got his family out. After the fire Smith observed fresh

human tracks, made since a rain the night before, leading from where the defendant was living to Smith's house; that it was subsequently demonstrated that these tracks were made by the defendant; and that some bad feeling existed between defendant and Smith. The Court, in reversing a judgment of death, said:

> "There was sufficient evidence to be submitted to the jury upon the issue of the defendant being at the house the night it was burned, and also of a motive for the defendant to set fire to the house; but even if it be conceded that the evidence established that the defendant had an opportunity to commit th crime and had a motive to commit the crime, in the absence of any evidence that the fire was of an incendiary origin, or even if it be further conceded that the fire was of incendiary origin, there is no evidence that this defendant set fire to the house. No one saw the defendant at the house at the time it was set fire, if it was set fire.
>
> "As was said . . ., 'this full summary of the incriminating facts, taken in the strongest view of them adverse to the prisoner, excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party. The mind is not simply left in a state of hesitancy and anxious doubt—it refuses to reach a conclusion.
>
> 'It is the accepted rule of law, at least in felonies and capital cases, that where the state relies for conviction upon circumstantial evidence alone, the facts established or adduced on the hearing must be of such a nature and so related to each other as to point unerringly to the defendant's

guilt and exclude every rational hypothesis of innocence.'

> "We think the evidence simply raises a strong suspicion of the defendant's guilt, but that it does not in any reasonable view prove his guilt. Taking the strongest view of the evidence adverse to the defendant, it leaves the mind in a state of doubt and uncertainty as to his guilt. The facts of which there is sufficient evidence, whether taken severally or collectively, and in their combined force, are not necessarily inconsistent with the defendant's innocence, and do not exclude the rational conclusion that the origin of the fire may have been other than set by the defendant."

No evidence was offered to connect the defendant with the purchase of, possession, or access to, gasoline or any other inflammable substance. Petersburg, Alaska, is a small town of approximately 1200 people of which the court may take judicial notice. If defendant had purchased gasoline, it could easily have been shown, and if he had a gas boat, automobile or any other appliance using gasoline, evidence thereof could have been obtained.

There was a total lack of evidence that defendant was connected with the fire, other than he endeavored to assist in putting it out. Moreover, there is testimony, offered by the Government, through witness Clifford Fenn that he saw defendant coming from one of the beer parlors about one o'clock in the morning, closing time, several blocks away from the scene of the alleged crime, and at about the time the fire must have started, judging by the headway it had achieved when alarm was sounded. (R.

59). Fenn testified (R. 61) that he did not notice defendant carrying anything at the time. Pete Villarde testified that he heard accused come into his room, located above Villarde's, at one fifteen, (R. 73), and that later he heard him talking in his room.

The law places upon the prosecution the duty of connecting defendant with the crime of which he is charged. 6 C. J. Sec. page 749, where it is said: "Burden of proof is on state to connect the accused with the crime, and to prove the corpus delicti and all the necessary elements of the crime." In the leading case, Cristini v. State, supra, it is expressed as follows: "The state must adduce evidence which connects accused with the crime and must show that accused was personally present when fire is alleged to have been set by him." Not only is there an absence of direct proof that he was seen at the fire, at the time it must have been set, but there is no circumstantial evidence pointing to his presence there. The Government relied solely on the testimony of Mabel Jackson, age 11 years, to prove his presence at the fire, (R. 48), though she said that he was running, not very fast, and she did not see his face. To believe the testimony of Mabel Jackson, we would have to believe that defendant committed a crime, waited until it was discovered and the fire alarm was being turned in and then ran away in full view of anyone who might have been aroused.

To sum up, the government has failed to prove a corpus delicti, and has failed to rebut the presumption of acci-

dent. It has failed to connect the defendant with purchase or possession of gasoline and it has failed to connect him with the crime, if a crime was committed.

What then is the case against the defendant as set up by the testimony offered by the Government? Briefly it is this:

1. That there was bad feeling to a certain extent between defendant and John Silva;

2. That on the afternoon preceding the fire, defendant was denied admittance to the Silva house to see his child, and made statements, later interpreted as threats, against the house;

3. That the house burned that night, though there had been no fire in the stove for two or three hours preceding the outbreak of the fire;

4. That when officers went to defendant's room several hours after fire was discovered he did not answer the door and was apparently sound asleep.

Let us consider these four facts briefly. Certainly there was some bad feeling between the Silvas and the defendant, but according to the Government's own evidence that bad feeling existed *on the part of the Silvas* rather than on the part of the defendant. They disliked him sufficiently to deny him admission to the house to see his child, and his estranged wife, with whom he was trying to effect a reconciliation. He took gifts to the child; moreover there is evidence of bad feeling on the part of the Silvas in Mrs. Silva's request to Helen Zamora not to say any-

thing to the authorities about having smoked in the rooms just before the fire, (R. 68), *showing an inclination on the part of Mrs. Silva not to allow evidence favorable to defendant,* to be presented. There is however no direct evidence showing that defendant harbored ill feeling against the Silvas, save as is found in his statements later interpreted as threats. Granier heard defendant say that Silva was very proud of his house, after which he added: "Some day you won't have no home—then you won't be so proud." (R. 53). To interpret that as a threat is to strain the meaning of the English language to the breaking point. A more reasonable hypothesis is that defendant was trying to express in his illiterate way, an ancient adage. "Pride goes before a fall," the perpetual plaint of the "have nots" against the "haves." At no time does he say *I* will take your house away from you, *I* will make you lose your house, or even that the house will be burned. He might just as reasonably have been threatening legal redress for a violation of his right to see his child, legal redress that would deprive Silva of his house.

Third, the house burned that night, though there had been no fire in either stove since ten o'clock. The length of time that sparks may smoulder between walls, before bursting into flames, the hazards of fires from defective chimneys and the probability of fires from other causes has been or will be touched upon subsequently as to the cause of the fire that destroyed the Silva home. The smoking of Alice Bassford and Helen Zamora has

already been mentioned. There has been testimony offered by the defendant showing that kitchen stove was a converted oil burner, (R. 45, R. 65), a common source of accidental fires. There has also been testimony offered that John Silva's work clothes that he wore when painting were kept in the little room where the fire started, (R. 64), raising the presumption of a fire caused by spontaneous combustion; there was an offer to prove the chimney defective and to connect that testimony up with an expert's testimony about the hazards of fires from defective chimneys. In fact, there have been so many presumptions raised by the defense of the fire's being due to accidental causes, rather than to incendiarism, that we consider this point adequately answered.

Fourth, the defendant did not answer when the officers knocked on his door, after the fire was out, about five o'clock in the morning, showing according to Government theory, a guilty conscience. Helen's testimony that he was deaf, and had been for years should be taken as conclusive on that point. (R. 66). It has not been impeached save by the testimony of the two officers who knew him only casually, one of whom admits to having a very loud voice. (R. 78, 79). Moreover, Helen Zamora's testimony is corroborated by the testimony of Uly White, who said (R. 57, 58), that defendant wakened *after Fenn turned the flashlight on him in bed*, (italics ours) indicating that he was awakened by the light, rather than the noise made by the officers. Fenn substantiates this fact to a certain extent also in his testimony on cross exam-

ination, when he says he recalled using the flashlight, but did not remember whether or not he turned it upon defendant's face." (R. 62).

In the case of *State v. Campbell*, 174 *SE* 797, quite analogous to the case at bar, there were facts of much similarity: There was admitted bad feeling between the parties; there were threats, two of them, couched in unmistakable language, instead of a vague statement, and afterwards there was a fire of unexplained origin. Nevertheless, the Court while stating that the whole setting created grave suspicion, declared a conviction could not be founded on suspicion, and reversed the judgment of the lower court, although two accomplices of the defendant had been convicted of the same crime, on the basis of incriminating statements made by them, and the corpus delicti had been clearly and unequivocably proved.

The whole case against defendant is on such flimsy evidence, that the verdict can be explained only on the basis of racial prejudice, engendered and fed by the rulings of the court and the manner in which they were made.

ARGUMENT

POINT NO. 6

The Court erred in denying defendant's motion for a new trial and his motion for re-opening hearing on motion for new trial, after the discovery of evidence material to the defendant, as set up in said motions and accompanying affidavits, which are included in the record. (R. 89).

Affidavits of responsible Petersburg citizens were submitted giving accused a complete alibi. From the affidavits submitted voluntarily, it was apparent that accused could not have set the fire, and that therefore an innocent man had been convicted and sentenced to serve twenty years in the penitentiary. Petersburg is located more than 100 miles from Juneau, where the trial was held, and outside the limits for subpoena in forma pauperis; in addition to that, accused was entirely without funds to send some one to Petersburg to search for witnesses at the time of trial, and hence there was no way for either appellant or his attorney to know of these witnesses or to secure their attendance in court even if they were known. Following the pronouncement of his twenty year sentence, they were so shocked that they voluntarily offered to come forward to help him. We think the affidavits of Hermann Pederson and Willie Johnson prove that accused could not have set the fire. In either case there was action indicated for the Court to take. The fact that the Court refused to consider the affidavits, (R. 9-10-11-12-13), dismissing them with the statement that he did not think much of people who made affidavits of that nature, showed again the bias that animated him at all stages of the trial, and a willingness to permit an innocent man to suffer imprisonment rather than to admit his mistake. We consider his denial of the motion a further abuse of his judicial discretion.

ARGUMENT

POINT NO. 7

The Court erred in denying motion for continuance.

The facts set up in the affidavit supporting motion for continuance speak for themselves as to the materiality of the evidence of Beulah Rafal. (R. 4-5). We would not state what her testimony would be because it was rebuttal testimony, and until we heard the Government's testimony we did not know what she would testify to. The fact that the Government brought her from Petersburg, kept her in Juneau for more than a month, a paid witness, showed conclusively that she had direct knowledge concerning the case at issue. The fact that she was dismissed the day before the trial and told to return to Petersburg was further indicative of that point. Failing to grant the continuance to procure her presence, we thing the court should have allowed her testimony, given, under oath before the grand jury to be presented from notes of District Attorney.

CONCLUSION

We have here endeavored to present an objective analysis of this case as based upon the record. Frankly, it is our conviction that this analysis in itself justifies reversal of appellant's conviction and sentence of 20 years imprisonment.

By reason of the errors of law pointed out in the brief, appellant did not have a fair and impartial trial, and the conviction should be reversed.

Respectfully submitted,

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